Loy Food Stores, Inc. d/b/a Ken's IGA *and* Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC.
Case 33-CA-4747

November 17, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 22, 1981, Administrative Law Judge Richard L. Denison issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and a brief in partial support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings,[2] findings,[3] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Loy Food Stores, Inc. d/b/a Ken's IGA, Westville, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate our employees concerning their own or other employees' union activities, sympathies, or desires.

WE WILL NOT threaten our employees with discharge, layoff, shift cancellation, reduced working hours, changes, or other reprisals because they join or assist a union or engaged in other union activities for the purpose of collective bargaining or other mutual aid or protection, or because they selected the Union as their exclusive collective-bargaining agent.

WE WILL NOT threaten our employees that other employees have been discharged for signing a union authorization card.

WE WILL NOT threaten our employees that we believe they started the union campaign.

WE WILL NOT discharge, lay off, or otherwise discriminate against employees because of their union sympathies, activities, or protected concerted activities.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours of employment, and other terms and conditions of employment with Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC, in the appropriate unit described below:

All full-time and regular part-time employees employed by Loy Food Stores, Inc. d/b/a Ken's IGA at its Westville, Illinois, facility; but excluding the store manager, assistant managers, confidential employees, guards and supervisors as defined in the Act and all other employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the

[1] The Respondent has requested that the record be reopened and/or amended to include the averred facts that discharged employees Holycross and Harper accepted the Respondent's unconditional offers of reinstatement in November 1980. We hereby deny this request. Even assuming that these two employees were reinstated, we note that the Respondent states that they were not given any backpay for the period between their discharges and their reinstatement, and as such we would find that the reinstatements were insufficient to erase the effects of the Respondent's unfair labor practices or ensure a free and fair election among the Respondent's employees.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[2] The General Counsel has excepted to the Administrative Law Judge's refusal to compare signatures for the purpose of authenticating authorization cards and his failure to place the signature samples in the rejected exhibits file. We agree with the General Counsel that the Administrative Law Judge erred by such actions, but we find that this error was not prejudicial. Although we do not endorse the conduct of he counsel for the General Counsel in attempting to resubmit the rejected material by attaching it to his brief to the Administrative Law Judge, we disavow the Administrative Law Judge's characterization of that conduct.

[3] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

WE WILL recognize and, upon request, meet with and bargain collectively in good faith with Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC, as the exclusive collective-bargaining representative of all our employees in the appropriate unit; and, if any understanding is reached, embody such understanding in a written and signed agreement.

WE WILL offer Brad Holycross and Phil Harper immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of our discrimination against them, plus interest.

LOY FOOD STORES, INC. D/B/A KEN'S IGA

DECISION

STATEMENT OF THE CASE

RICHARD L. DENISON, Administrative Law Judge: This case was heard in Champaign, Illinois, on October 20, 21, and 22, 1980, based on a charge filed by Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC, at times referred to herein as the Union or the Charging Party, on March 5, 1980.[1] The complaint, issued April 29 and amended at the hearing, alleges violations of Section 8(a)(1), (3), and (5) of the Act. The General Counsel contends that immediately prior to the Respondent's rejection of the Union's request for recognition, based on an asserted authorization card majority, the Respondent discharged two employees, and engaged in numerous acts of interference, restraint, and coercion, which precluded the holding of a fair election in an appropriate unit of the Respondent's employees.

The Respondent's answer, as amended, denies the allegations of unfair labor practices alleged in the complaint.

Upon the entire record in the case, including my observation of the witnesses and consideration of the briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges and the answer admits that at all times material herein the Respondent is and has been an Illinois corporation with an office and place of business located at Westville, Illinois, where it is engaged in the business of the retail selling of foodstuffs and related items. During the 12-month period preceding the issuance of the complaint, a representative period, in the course and conduct of its business operations, the Respondent derived gross revenues in excess of $500,000, and, in the course and conduct of its business operations, the Respondent purchased and caused to be transferred and delivered to its Westville, Illinois, facility, goods and materials valued in excess of $50,000 directly from points outside the State of Illinois. I find that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. SUPERVISORY STATUS

Based on paragraph 4 of both the complaint and the answer, I find that at all times material herein, the following named persons occupied the positions set opposite their respective names, and have been, and are, agents of the Respondent at its Westville, Illinois, facility, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act:

Kennard R. Davis	President
Gene Engle	Store Manager
Paul Baldwin	Assistant Manager
Michael Farmer	Assistant Manager
William Delp	Assistant Manager

IV. APPROPRIATE UNIT

Paragraph 7(a) of the complaint, as amended, alleges, and the Respondent's answer, as amended, admits that all full-time and regular part-time employees employed by the Respondent at its Westville, Illinois, facility; but excluding the store manager, assistant managers, confidential employees, guards, and supervisors as defined in the Act and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and I so find.

[1] The name of the Charging Party and the name of the Respondent appear as amended at the hearing.

All dates are in 1980, unless otherwise specified.

V. THE UNFAIR LABOR PRACTICES

A. *A Union Campaign Begins at the Respondent's Store*

The Respondent, a retail grocery store in Westville, Illinois, is affiliated with the Independent Grocers Association, commonly known as IGA. As of late February 1980, utilizing a work force of 5 supervisors and 30 part-time and full-time employees, as stipulated, the Respondent operated its business on a 3-shift, 24-hour-per-day, 7-day-per-week basis.

Terri Keller, a regular part-time checker, initiated the union activity at Ken's IGA by phoning Jim Newman, the Union's business agent, on January 17. After discussing with Keller the methods and procedures for conducting a card-signing drive, Newman asked for a list of employees' names and addresses and promised to send her a supply of authorization cards for her use in beginning the campaign. She received these cards on January 18, signed one, returned it to the Union by mail together with the employee list, and gave the remaining cards to employees at the store.

After receiving the list compiled by Keller, containing the names of 24 employees at the store including Meat Manager Bill Delp and Assistant Manager Willie Delp, on January 21 Business Agent David Kemp was assigned the responsibility of conducting the drive to organize the Respondent. Immediately thereafter, he mailed two authorization cards to each person whose name appeared on the list. At various times thereafter, as described in detail in the record, Kemp held union meetings at employees' homes. He solicited and received signed authorization cards both at these meetings and through the mail. The dated authorization cards in evidence show that as of January 29, in addition to Keller, cashiers Myra Nickle, Delores Nightlinger, and Rita Wynn, and checker Diana Roberts had signed union authorization cards.

B. *Store Manager Engle's January 29 Meeting With Employees*

Based on undisputed testimony by Owner Kennard R. Davis and Store Manager Gene H. Engle, the Respondent became concerned about its low gross profit and sales per man-hour ratio after they received the profit-and-loss statement for the end of 1979 and a visit from Zone Manager Lee Singleton emphasizing these deficiencies. In the meantime, Assistant Manager Mike Farmer told Engle and Davis that he had received the union card through the mail, and that a union organizer had stopped by his house while he was away. When Davis advised Singleton of this development, he instructed Davis not to accept the cards. Having all of these developments in mind, Davis and Engle had a number of informal talks in which they discussed what should be done. In addition to the store's economic problems, they also discussed the subject of the Union.[2] The end result of these conversations was that Davis decided that Engle should hold a meeting with the employees to talk about ways to improve the Company's economic circumstances and to give the Respondent's views concerning the Union.

Pursuant to a posted notice, the meeting was held at the store at 7 p.m. on January 29.[3] Only the checkers, stockboys, Davis, Engle, and Assistant Manager Paul Baldwin attended. Based on the estimates of Engle and Davis, the meeting lasted between approximately 1 to 2 hours. Engle was the only person to speak on behalf of the store's management. Although the meeting was ostensibly called mainly to discuss the store's unacceptable profit level, Engle, nevertheless, began by discussing the Union. He thanked the employees for attending, stated he understood there were some cards being circulated by a union, and expressed the hope that the employees would reconsider before signing, since he would rather deal personally with each individual on a one-on-one basis instead of involving a third party. The remainder of Engle's remarks about the Union were made in response to a question by Terri Keller, and a remark by cashier Margaret Valongeon. According to Engle and Davis, Keller asked if the employees would be fired if they signed cards, and Engle answered no, that that was her right as an individual and as an employee. Then Valongeon interjected, "No, he can't fire you, because that would be against our constitutional rights," to which Engle responded, "No, but the union recognizes that I have a right to make a profit, even if it means reduced store hours causing employee layoff." Engle and Davis testified that the remainder of the meeting was devoted to a review of the Company's financial problem, and to solicited suggestions from the employees as to how the adverse situation could be remedied.

Cashier Myra Nickle testified that the meeting was the first to be held in approximately a year and a half. It began shortly after 7 p.m. when Engle stated he had heard the employees received union cards by mail. He said that it did not matter if they were green, yellow, or blue, that the employees should make up their own minds whether or sign them. He continued, however, by saying that if the Union did get in, there would be a layoff. He said that the Union promised a lot of things, but that they did not always come through. There was also high cost and union dues. At approximately this point Terri Keller came into the meeting, slightly late. She asked if they signed cards, would they be fired, and Engle answered that he had no way of knowing who had signed cards, but that if a union did get in the hours would be cut. He said that he could not fire the employees, but he could lay them off. Then Engle talked about the economic conditions at the store. He asked the employees to estimate how much profit they made from a dollar. The employees were surprised to learn how small the Company's margin of profit was. Engle explained that the store was losing $800 or $900 a week and asked

[2] Engle could not remember what he said to Davis during these discussions although he recalled that the subject of the Union "came up in conversation quite often." Davis remembered discussing employees' voting preferences with Engle, but could not remember when this topic was explored.

[3] Only Engle was uncertain of the date, which he believed to be January 28, but had failed to write anything down about the meeting and, consequently, could not remember. Other witnesses definitely fixed the date as January 29, and they are credited.

for suggestions for improvement. Prices not being changed at the end of a sale, customer theft, and deposits on soft drinks were the main areas mentioned. He emphasized that it was necessary for the store to make a profit, and that in order to maintain that profit he could lay people off.

Terri Keller testified that she arrived at the point in Engle's remarks where he was saying that the Union makes a lot of promises, charges dues, but does not always deliver. He said they could ask Rita Wynn. He said he could not afford to keep all of them if the Union came in. Then he began talking about the Company's profits and losses and asked for a couple of the employees to estimate what they thought he made on the dollar. Their estimates were high, and he emphasized that he was not making as much as they thought. Then Keller asked if they signed union cards, would they be fired, and Engle answered no, because he did not know who signed. But then he said, "I do have the power to lay you off." Then Margaret Valongeon, another cashier, spoke up and said that he could not do that, because if he laid them off he would have to bring them back before he hired anyone else. Engle answered that he could not afford to keep them and would have to cut hours if the Union came in. Engle said that the store was losing $800 or $900 a week and asked for the employees to make suggestions on how to improve profits. Suggestions by employees were made, including considerable discussion about mismarked off-sale items and the failure to mark soft drinks. Keller also remembered Engle stating that it was up to each of the employees to decide for themselves concerning the Union.

Engle denied threatening the assembled employees with discharge or layoff if they signed cards or if the Union came in. However, Engle found it impossible while testifying to remember in any detail his actual remarks to the assembled workers. He emphasized that he had failed to make notes of anything he said. I was not impressed with his memory. Likewise, Davis' testimony concerning Engle's remarks about the Union were couched in general terms, and contained vague qualifying phrases, e.g., "something of that nature," and "something to the effect." Considering that the Company knew well in advance the message that it wished to communicate to the employees, while the employees did not know, I find Nickle's and Keller's versions more detailed and precise concerning that area of the meeting in which the topic of the Union was discussed. I credit their versions and find that, in his January 29 address, Engle did in fact threaten the employees with reduced hours, with a layoff, and some of them would go, if the Union came in, or if they signed union cards. Thus, the Respondent violated Section 8(a)(1) of the Act in this portion of Engle's speech, as alleged in paragraphs 5(a)(1), (2), and (3) of the complaint, as amended.

C. *Further Interrogation and Threats by the Store's Supervision*

According to Diana Roberts, a third-shift checker at the Respondent's store, on or about February 4 she was in the dairy department when Gene Engle engaged her in conversation concerning the Union in the presence of Assistant Manager William Delp. Engle said he knew the Union was trying to get in. Then he stated that he did not care whether employees signed cards, but that if the Union got in they would have to shut down the third shift, because there was no way they could afford to keep it open. Engle denied threatening employees that their work hours would be reduced if the Union succeeded in organizing the Respondent, but later qualified that denial by stating generally that he did not remember ever talking about the Union to any employee. Third-Shift Assistant Manager Delp testified that he remembered the conversation in question, which occurred about 7 a.m. as they were preparing to leave work at the end of the shift. Although Delp also had difficulty remembering all that was said, he did recall Engle stating that while there was not going to be a layoff, "We would be put down to the second or first shift if it closes down, the third shift." Delp could not recall precisely whether Engle's remarks were made on the occasion of the conversation with Roberts, or on another occasion around that time. Nevertheless, Delp's testimony clearly tends to corroborate that of Roberts and refute Engle's qualified denial. I credit Roberts and find that the Respondent, through Engle, threatened an employee that the third shift would be eliminated if the Union got in, as alleged in paragraph 5(e) of the complaint as amended.[4]

Myra Nickle testified that on February 15 about 5 p.m. in the store, Assistant Manager Paul Baldwin began to talk to her about the Union. No one else was present. He said that she should be ashamed of herself for starting the Union, and, when Nickle protested that she did not start the Union, Baldwin asked, "Well, then, who did?" When Nickle answered that she did not know and if she did would not tell him. Baldwin retorted, "You're hurting me by doing this, you know." Nickle asked what he meant, and Baldwin said, "Well, I had a talk with Gene and Ken, and they told me that I am going to lose my job. They said if they kept me I would be a stockboy, and that would be lower pay." The conversation ended at this point, when a customer interrupted.

Baldwin did not testify at any point in the hearing. Nickle's testimony was not impaired by cross-examination. I credit her testimony and find that the Respondent, through Baldwin, unlawfully interrogated Nickle con-

[4] William Delp's uncertainty in his testimony concerning whether he heard one or two conversations between Roberts and Engle about the closing of the third shift caused counsel for the General Counsel to propose a further amendment to the complaint, par. 5(f), alleging that on or about February 4 Engle interrogated Roberts concerning her own and other employees' union activities. A close reading of the record reveals that Delp's testimony contains no account of Engle's having asked any questions during the conversation. The only mention of Engle asking anything about the Union is contained in a double question by counsel for the General Counsel after Delp had completed telling what he remembered of the conversation.

> Q. (By Mr. Somers) Okay. Now, you testified that Mr. Engle asked you if the Union was trying to get in, and that he said he would have to close down the third shift, right? If it did?
>
> A. Yes. He wasn't sure but he said he might have to.

On redirect examination Delp denied that Engle asked any questions, and no further clarification of this segment of Delp's testimony appears in the record. Under these circumstances, I find that the General Counsel has failed to prove that Gene Engle engaged in unlawful interrogation on or about February 4 as alleged in par. 5(f) of the complaint.

cerning who started the Union, and threatened her that store employees' hours would be reduced if the Union came in, in violation of Section 8(a)(1) of the Act, as alleged in paragraphs 5(c)(1) and (3). I also find that Baldwin's remark that Nickle should be ashamed of herself for starting the Union is violative of Section 8(a)(1), in that through this remark Baldwin coercively conveyed to Nickle the message that the Respondent believed she had instigated the Union's organizational drive, as alleged in paragraph 5(c)(2) of the complaint.

Myra Nickle further testified that on February 1 Assistant Manager Mike Farmer approached her in the store, alone, and asked, "Did you start this Union?" Upon receiving a negative answer Farmer asked, "Are you sure," and Nickle said that she was sure. Farmer acknowledged that he might have told the investigating Board agent that he had several conversations with employees about the Union during February 1980. He did not deny having a conversation with Myra Nickle about the Union around the time she specified, stating, instead, that he could not remember having such a conversation. Furthermore, although Farmer denied ever having asked Nickle *why* she started the Union, he did not specifically deny asking her *if* she started the Union—an entirely different question. Therefore, Nickle's testimony about the February 1 incident stands undenied and is credited. I find that the Respondent violated Section 8(a)(1) of the Act, through Farmer, by interrogating Nickle concerning her union activities, as alleged in paragraph 5(d) of the complaint.

Alleged discriminatee Brad Holycross testified that at the outset of his discharge interview with Gene Engle, alone, on February 28 at the store, Engle began by stating that "[W]ith all the union getting in here, there's going to be a lot of changes and a lot of people laid off." Engle denied making this threat. However, Holycross' testimony concerning Engle's alleged remarks is consistent with the statements found to have been made by Engle during his January 29 address to the assembled employees. I credit Holycross, who impressed me as an honest witness, and find that the Respondent, through Engle, threatened him during Holycross' discharge interview on February 28 as alleged in paragraph 5(b) of the complaint.

Alleged discriminatee Phillip Harper testified that on February 28, in the grocery area of the store, he heard Paul Baldwin tell Michael Farmer that when the Union got in there would be a layoff and many people would be laid off. Shortly thereafter Harper, being concerned about this statement, approached Baldwin, alone, in the area of the magazine rack and asked for more details. Baldwin responded they would cut back, and there would be only one assistant manager, Farmer, because he had more seniority than Baldwin, who would be reduced to a full-time stockboy. Continuing, Baldwin pointed his finger at Harper and said Harper would not have a job because he did not have enough seniority. Referring to himself, Baldwin said he would not be able to make it as a full-time stockboy because it did not pay enough, and if the Union got in he would probably have to quit, because if they were cutting hours he would not get that many hours and it would not be worth it. Baldwin said if the Union got in there would be a layoff and the store hours would be cut. Baldwin did not testify. Harper exhibited a reasonably good memory and was not questioned about this incident on cross-examination. I credit his testimony and find that the Respondent, through Baldwin, threatened Harper with a layoff if the Union came in, as alleged in paragraph 5(c)(3) of the complaint.

Based on undisputed and credited testimony by Myra Nickle, I find that on February 29 in the store, about 11 p.m., following the discharges of Holycross and Harper, Nickle approached Paul Baldwin and asked him why they had been fired. Baldwin answered that he did not know what had happened to Brad Holycross or why he was fired. Concerning Harper, Baldwin said he had been told by Gene Engle that he intended to keep Harper because he was a no vote for the Union, but then Engle heard that he had signed a card and planned to release Harper that evening after work. However, he said, when Engle found a lot of outdated and spoiled cottage cheese, he released Harper that morning. In his testimony, Engle admitted talking with Davis about employees' voting preferences, and with Baldwin about the Union. I find that the Respondent violated Section 8(a)(1) of the Act by threatening Nickle that one of her fellow employees had been fired because he signed a union card, as alleged in paragraph 5(c)(4) of the complaint.

D. *The Discharges of Brad Holycross and Phil Harper*

Brad Allan Holycross worked as a part-time stockboy on Saturdays and Sundays on the second shift from June 1979 until his discharge on February 28. He signed a union card on February 18 at a union meeting at Myra Nickle's home. Holycross' duties consisted of price marking items, stocking shelves, rotating products in the dairy case, and bagging and carrying out groceries for customers. Included within this general description of Holycross' duties was the specific task of changing the price marking on items from a sale price back to the regular price after the expiration of the sale. Holycross was not the only stockperson who worked Saturdays under the supervision of Gene Engle and Assistant Manager Mike Farmer, who conceded that the stockboys occasionally make mistakes in changing prices and also that the price lists from which they work are occasionally in error. The Respondent's president, Ken Davis, described Holycross' work performance prior to the January 29 employee meeting, as neither good nor bad.

During that portion of the January 29 employee meeting which was devoted to receiving employees' suggestions on how to improve profits, one of the topics discussed was mismarked off-sale items. Following the meeting, according to Davis, he talked with Mike Farmer, the Saturday night supervisor, who told him that remarking the off-sale items was the responsibility of Brad Holycross. Farmer, on the other hand, remembered Davis talking to him about profit and loss during the week after the meeting and stating that a lot of the price changes were not getting done. Farmer made no mention of Davis having asked for the identity of the employee responsible for changing the prices, or his having told Davis that Holycross performed this function. Farmer

did testify that he simply told Holycross "that Ken was a little unhappy because of the pricing wasn't getting completely done." Thereafter, according to Farmer, during the remainder of January and on into February, he "noticed a few things" on occasion which had not been changed back to the regular price, but was unable to recall which items had not been changed. Farmer was unable to recall whether he ever discussed this problem with Holycross again. When asked if he ever discussed the matter with Ken Davis again, Farmer hesitated and answered, "I think I did." Farmer testified that he was never consulted by Ken Davis or Gene Engle about discharging Holycross for failure to change back sale items on Saturday night. He found out that Holycross had been discharged after the fact, when Engle told him he had let Brad go. According to Farmer, Engle never told him the reason for Holycross' discharge. He testified that he did not know the reason Holycross was terminated, but "I pretty well guessed." Farmer was never asked to elaborate on this response.[5]

Holycross was discharged on February 28 by Engle during a phone conversation with Holycross' mother, in which he stated that he was going to lay off her son and asked her to have Holycross contact him at the store. According to Engle, he acted upon instructions from Davis and fired Holycross solely because of his erroneous work in connection with the off-sale list. Engle's asserted reason for Holycross' discharge is consistent with the Respondent's April 2 position letter, but partially inconsistent with Davis' testimony that Holycross was released also for the purpose of reducing man-hours and improving the store's sale-per-man-hour ratio. Thus, it is clear that there are numerous inconsistencies in the testimonies of the Respondent's supervisors with respect to the events leading up to Holycross' termination. Furthermore, Davis and Engle acknowledged that during a meeting on February 25, only 3 days before Holycross' discharge (and 4 days before Harper's termination), the two men discussed the voting preferences of store employees with respect to a possible union election, at a time when they knew through Assistant Manager Farmer that almost all the employees had attended a union meeting on February 18. Davis admitted that the voting preferences of Holycross and Harper were specifically discussed at the same time when they were discussing their dissatisfaction with Holycross' and Harper's work.

All of these circumstances discussed above strongly suggest that the Respondent's expressed concern over Holycross' alleged failure to remark unidentified off-sale items is a pretext, and that the real reason for his termination was that the Respondent suspected he favored having the Union as his collective-bargaining representative. In my view, this perspective concerning the true reason for Holycross' discharge is confirmed by Engle's statement during his final interview with Holycross on February 28 in the back room of the store that, "With all the union getting in here, there's going to be a lot of changes and a lot of people laid off." In the light of that statement, Engle's further explanation to Holycross that he was doing the off-sale list wrong, his hair was too long, and Holycross' parents had cheated his son on the sale of a used television set is simply incredible and only serves to reinforce the conclusion that the Respondent was groping for a pretext with which to rid itself of a union adherent it could operate without. It is little wonder that the interview ended with Engle failing to answer Holycross' question about what he had done wrong with respect to the off-sale list. I find that the reasons espoused by the Respondent for Brad Holycross' discharge are pretexts and that he was discharged because of his known or suspected union sympathies and activities in violation of Section 8(a)(1) and (3) of the Act.

Phillip Harper worked as a full-time stockboy on the first shift, Monday through Friday. His immediate supervisor was Gene Engle. His duties were the same as those of Brad Holycross, and specifically included filling the dairy case. Because of the relatively short spoilage time, dairy products are date coded. When they become outdated they must eventually be removed. On February 29 Gene Engle telephoned the Harper home and told Phillip Harper's mother that he did not need Phillip any more, that he had been dissatisfied with his work because he had found outdated cottage cheese in the dairy case. In both Engle's and Mrs. Harper's versions of this conversation Phillip Harper's discharge was attributed by Engle to the discovery of the outdated cottage cheese. Davis, on the other hand, testified that Engle had told him Harper had failed to rotate milk on the evening of February 28. This inconsistency remains unresolved. Harper received no warning or opportunity to improve prior to his discharge. Furthermore, I find the Respondent failed to prove that Harper was primarily responsible for the dairy case since, at the least, the record reveals that other stockboys on other shifts also had the same duties as Harper, including the dairy case. These inconsistencies suggest that the asserted reason for Harper's discharge is a pretext.

There are other indicators which also point in this direction. Harper was hired in June 1979 and between that time and October performed the duties of a part-time stockboy on both days and nights. Although, according to Engle, Harper could not keep up with the work and was removed from the night crew, he was not fired because, in Engle's words, "He was better than nothing." Nevertheless, despite this dim appraisal of Harper's performance, in late October 1979 when full-time stockboy Paul Barber was fired and part-time stockboy Bart Atwood refused full-time work, Engle promoted Harper to the job instead of looking elsewhere. Moreover, his duties and responsibilities were increased. According to Engle and Davis, during the next 3 months Harper's deficiencies became readily apparent, and they discussed his poor attitude toward his job with him on a number of occasions. However, in contradiction of his contention,

[5] Later in his testimony, on redirect examination, Farmer gave answers pursuant to strongly suggestive leading questions from counsel for the Respondent which tended to show more communication between Farmer, Davis, and Engle with respect to the off-sale item pricing errors allegedly involving Holycross and, in addition, tended to emphasize more participation by Farmer in the process leading up to Holycross' release. Under all the circumstances, I am persuaded that Farmer's earlier version is the most reliable account.

they also stated that during this period Harper did not commit any serious errors. Thus, the Respondent condoned whatever shortcomings Harper may have possessed, and Harper remained on the job until after it learned of the Union's organizational drive and made the previously discussed assessment of Harper's sympathies and activities concerning the Union. The extent of the Respondent's maintenance of an understanding attitude toward Harper, until the union question came upon the scene, is clearly revealed by its failure to discharge Harper when he and stockboy Chad Fueyo drank 4 quarts of Busch beer in Harper's car in the store parking lot, and then proceeded to drive the car in reverse through the store's front window.[6]

As noted earlier in this Decision, in discussing the events leading up to the termination of Brad Holycross, Engle and Davis met on February 25 and discussed Harper's and Holycross' voting preferences in the light of their knowledge of the union campaign, and the report of Assistant Manager Farmer that almost all the employees had attended a union meeting on February 18. Engle also discussed the union situation with the assistant managers. Nevertheless, Engle insisted that it was his discovery of outdated Weight Watchers milk and cottage cheese in the dairy case which angered him and precipitated Harper's termination. On cross-examination, however, Engle conceded that he was unable to recall the coded dates stamped on the containers and was even unable to explain how to interpret the coded numbers. Having considered all of the evidence presented with respect to Harper's discharge, including the significant portions of testimony described above, I can only find and conclude, as I do, that the reason offered by the Respondent for Harper's termination is a pretext, and that he was actually discharged because of his known or suspected union activities and sympathies. The accuracy of this assessment is further confirmed by the undisputed testimony of Myra Nickle concerning her conversation with Paul Baldwin in the store about 11 p.m. on February 29. On that occasion Baldwin told Nickle that Engle had taken advantage of his discovery of the outdated cottage cheese to fire Harper that morning, instead of implementing his original plan to release Harper that evening after work, because he had heard that Harper had signed a union card. I find that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Phillip Harper on February 29.

E. *The Alleged Violation of Section 8(a)(5) of the Act*

Paragraph 7(b) of the complaint alleges that on or about February 21 a majority of Respondent's employees in the admitted appropriate unit, set forth in section IV of this Decision, designated and selected the Union as their collective-bargaining representative. Paragraphs 7(d) and 8, respectively, allege that the Union requested recognition on February 29, and since that time the Respondent has failed and refused to recognize the Union as the exclusive collective-bargaining representative of its unit employees. The General Counsel alleges in paragraph 12 of the complaint that the Respondent's unfair labor practices constitute a course of conduct precluding the holding of a fair election among the employees in the unit and are so serious and substantial in character and effect as to warrant the entry of a remedial order requiring the Respondent as of February 21 to recognize and bargain with the Union. Counsel for the General Counsel argues that the Respondent's actions dissipated the Union's support and dampened continued enthusiasm for union activity so as to effectively preclude the filing of a representation petition and the holding of a fair and free election.

The Respondent contends, apart from arguing that no unfair labor practices were committed, that the General Counsel has failed to show that the unfair labor practices were so coercive, pervasive, or extensive as to require a bargaining order, or that the application of traditional remedies would not insure a fair election. The Respondent also argues that the conduct which comprises the unfair labor practices did not affect the employees, that a large majority of the authorization cards were signed after the bulk of the illegal action had occurred, and that the Union secured its last authorization cards and sent its bargaining demand to the Respondent after all of the alleged unlawful conduct had been committed.

Joint Exhibit J-1, signed by a representative of each party to this proceeding, shows that as of February 29, the date of the Union's letter, in evidence, lawfully requesting recognition, the appropriate collective-bargaining unit consisted of 30 employees. On March 6 the Respondent rejected the Union's demand for recognition asserting a good-faith doubt of its majority status. At the hearing in this matter, the General Counsel introduced into evidence 19 authenticated authorization cards from bargaining unit employees, 16 of which were signed between January 18 and February 21. Of the remaining cards, two were dated February 28, and the last card was dated February 29, the date of the Union's written demand for recognition.[7] Each of the 19 authorization cards was received into evidence without objection, except for General Counsel's Exhibit 22, the authorization card of Dorothy Wilson, dated February 29. This

[6] Neither employee was disciplined in any manner. Engle's explanation for this exercise in leniency was that the employees were off duty at the time of the incident, and if he had discharged them he would not have anyone to run the store since Westville was a small town. The contrast between the Respondent's inaction with respect to this incident, and its swift application of the ultimate sanction of discharge following the advent of the union campaign, when Harper, or possibly someone else, failed to rotate the cottage cheese, is striking, to say the least.

[7] Counsel for the General Counsel also offered into evidence copies of signatures (G.C. Exhs. 23–26 and 30) for comparison by the Administrative Law Judge for the purpose of authenticity corroboration. I rejected the exhibits on the basis of a lack of technical training as a handwriting expert and refused to permit these exhibits to be placed in the rejected exhibit file. Counsel for the General Counsel has attached photostatic copies of these rejected exhibits to his brief "for signature comparison, if necessary," and as "further evidence of the validity of four cards." These attachments to General Counsel's brief are stricken *sua sponte* and have not been considered. Regardless of whether my ruling was correct or incorrect, the sending of case related materials outside the record to the Administrative Law Judge by counsel for the General Counsel's attachment of these excluded documents to his brief, however well intentioned, is, to say the least, unprofessional and not to be encouraged. *United Brotherhood of Carpenters and Joiners of America and Scott and Duncan, Inc.*, 239 NLRB 1370, 1373, fn. 1 (1979).

card was introduced into evidence through the testimony of Delores Nightlinger who, after observing Wilson sign the card on that date, accepted it from Wilson and thereafter turned it in to Union Representative Kemp. Under these circumstances, I find that Wilson's card has been properly authenticated and is valid, despite the fact that Wilson did not fill in the blank spaces on the card provided for the name of the company, the store address and number, and her job title.

The authorization cards are clear and unambiguous on their face. They state, "I . . . hereby authorize United Food and Commercial Workers International Union, AFL-CIO, or its chartered local union to represent me for the purposes of collective bargaining, respecting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law." There is no evidence in the record to show that any of the cardsigners were told or assured that their card was to be used solely for the purpose of obtaining an election. Indeed, there is no evidence in the record from the card solicitors, the card signers, or anyone else, that any misrepresentation of any kind was made. I find that all of the cards introduced into evidence by the General Counsel are valid, and, therefore, I further find that on February 21, and thereafter, a majority of the Respondent's unit employees designated and selected the Union as their exclusive collective-bargaining representative.

Thus, the sole remaining question to be resolved is whether under the standards enunciated by the United States Supreme Court in *N.L.R.B.* v. *Gissel Packing Co., Inc., et al.*, 395 U.S. 575, 614-615 (1969), the Respondent's unfair labor practices warrant the issuance of a bargaining order. In the *Gissel* decision the Court stated, in part (at 614-615):

> The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

The record shows that the Respondent began its course of unlawful conduct on January 29 during a store meeting with employees shortly after it learned of the beginning of the Union's organizational drive, and steadily thereafter increased its antiunion activities in severity and number of occurrences, culminating with the discharge of Phillip Harper on February 29, the date on which the last authorization card in evidence was signed. Thus, the Respondent's contentions, as set forth above, are not supported by the facts. After February 21, at which time the Union had obtained a one-card majority, only three additional authorization cards were obtained from the 30-employee unit during the period in which the Respondent's unlawful activity reached its climax, and none following the discharge of one-fifthteenth of its work force. Thus, analysis of the increasing seriousness of the Respondent's unfair labor practices in correlation with the declining success of the Union's organizational activities persuades me that the application of traditional Board remedies in the instant case would be insufficient, and that the holding of a fair and free election under such circumstances is highly unlikely. I therefore find the issuance of a bargaining order, as part of an appropriate remedy for the unfair labor practices committed, necessary. I find that the Respondent violated Section 8(a)(1) and (5) of the Act on February 21 and thereafter by failing and refusing to bargain with the Union as the exclusive representative of its employees in the appropriate unit. In accordance with the principles enunciated by the Board in *Trading Port, Inc.*, 219 NLRB 298 (1975), I find that the Respondent had an obligation to bargain with the Union as of February 21, 1980, by which date the Respondent had clearly embarked on a clear course of unlawful conduct which undermined the Union's majority status and made the holding of a fair election improbable.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with discharge, layoff, reduced hours, changes, or other reprisals if they signed union cards, joined, engaged in union activities, or selected the Union as their collective-bargaining representative; by interrogating employees concerning their own or other employees' union activities, sympathies, or desires; by threatening an employee that the Respondent believed that employee started the Union; by threatening employees that another employee had been fired because he signed a union card; and by threatening employees with the elimination of the third shift in the store, the Respondent through its supervisors and agents violated Section 8(a)(1) of the Act.

4. By discharging Brad Holycross on February 28 and Phillip Harper on February 29 because of their known or suspected union sympathies and activities, the Respondent violated Section 8(a)(1) and (3) of the Act.

5. The collective-bargaining unit set forth in section IV of this Decision constitutes a unit appropriate for the

purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. Beginning on February 21, 1980, and at all times thereafter, the Union represented a majority of the employees in the unit set forth in section IV of this Decision, and is, and has been the exclusive representative of said employees for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. By refusing to recognize and bargain collectively with the Union with respect to the rates of pay, hours of employment, and other terms and conditions of employment of the employees in the appropriate unit on and after February 21, 1980, by which date it had embarked on a clear course of unlawful conduct which undermined the Union's majority status and made the holding of a fair election improbable, the Respondent violated Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent has not violated the Act in any respects other than those specifically found.[8]

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily discharged Brad Holycross and Phillip Harper, I find it necessary to order that the Respondent offer them immediate and full reinstatement with backpay computed on a quarterly basis, plus interest as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[9]

Since the Respondent unlawfully refused to bargain with the Union, I shall also order the Respondent to bargain with Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC, effective February 21, 1980, and to post an appropriate notice. Moreover, since I find that the unfair labor practices committed by the Respondent were serious in nature and struck at the very heart of rights intended to be protected by the Act, I find a broad cease-and-desist order is warranted.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

The Respondent, Loy Food Stores, Inc. d/b/a Ken's IGA, Westville, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their own or other employees' union activities, sympathies, or desires.

(b) Threatening employees with discharge, layoff, reduced hours, changes, or other reprisals if they signed union cards, joined, engaged in union activities, or selected the Union as their collective-bargaining representative; interrogating employees concerning their own or other employees' union activities, sympathies, or desires; threatening an employee that the Respondent believed that employee started the Union; threatening employees that another employee had been fired because he signed a union card; and threatening employees with the elimination of the third shift in the store.

(c) Discharging, laying off, or otherwise discriminating against employees in regard to hire and tenure of employment, or any term or condition of employment, because they joined or assisted Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC, or any other labor organization, or because they engaged in union activities or protected concerted activities.

(d) Refusing to bargain collectively concerning rates of pay, wages, hours of employment, and other terms and conditions of employment, with Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC, as the exclusive representative of all employees in the appropriate unit described in section IV of this Decision.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, recognize, meet with and bargain collectively in good faith with the Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC, as the exclusive collective-bargaining representative of all our employees in the appropriate

[8] The complaint, as amended at the hearing, contains no allegation and the record contains no evidence which would support a finding that the Respondent conveyed to employees the impression that their union activities were under surveillance, which contention is raised for the first time on p. 46 of the General Counsel's brief. Nor do I make any finding concerning the contentions which emerge for the first time in that document and were not fully litigated at the hearing, concerning the awarding of unilateral wage increases to employees without first notifying and bargaining with the Union. In any event, with respect to this latter contention, a broad bargaining order found herein to be appropriate would encompass the complained of conduct.

[9] See, generally, *Isis Plumbing & Heating Co.*, 318 NLRB 761 (1962).

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

unit set forth in section IV of this Decision; and, if any understanding is reached, embody such understanding in a written and signed agreement.

(b) Offer Brad Holycross and Phillip Harper immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Westville, Illinois, store, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 33, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 33, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint, as amended, be dismissed to the extent it alleges violations of the Act not found herein.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."